



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 456 OF 2013**

**BISHOP ARTHUR KITONGA**

**BISHOP PAUL MUTUAL**

**ABISAI MWAKA (Suing as Registered trustee of**

**REMEEMED GOSPEL CHURCH).....PLAINTIFF**

**VERSUS**

**KEN NG'ONDI.....1<sup>ST</sup> DEFENDANT**

**MESHACK LEIGUTA.....2<sup>ND</sup> DEFENDANT**

**RULING**

**The Plaintiff's Application**

The Plaintiff has sought the following orders in an application by way of a Notice of Motion dated 15<sup>th</sup> April 2013:

1. That this Court grants a temporary injunction restraining the Defendants from threatening to invade and demolish the Plaintiff's perimeter fence and other properties in LR. No. Nairobi Block 153/5 and Nairobi Block 153/7, and/or causing the same to be sub-divided to smaller portions pending the hearing and determination of this suit.
2. That this grants a temporary injunction restraining the Defendants from interfering with their peaceful enjoyment of the Plaintiff's property known LR. No. Nairobi Block 153/5 and Nairobi Block 153/7 (hereinafter "the suit properties"), until the determination of this suit.
3. That the Officer Commanding Station, Embakasi be directed to enforce the said orders.

The application is premised on grounds that the Plaintiff is the registered proprietor of the suit properties, and that the Defendants have without any right threatened to invade the said properties, demolish the perimeter wall thereon, and to subdivide the same. Further, that they have ordered the Plaintiff to stop any further developments on the suit properties.

The Plaintiff filed a supporting affidavit sworn on 15<sup>th</sup> April 2013 by Abisai Mwaka, one of the Plaintiff's Registered Trustees, wherein he gave the history of the Plaintiff's acquisition of the suit properties, including its application for allocation, and the subsequent allocation of the properties and the

registration of leases in the Plaintiff's names on 13<sup>th</sup> February 2009 and 24<sup>th</sup> March 2009 respectively. He attached copies of the said allotment letters and certificate of leases.

The deponent stated that the Plaintiff subsequently developed a church and a nursery school on the two parcels of land as per the requirements of the leases. Further, that in order to improve security of the welfare of both the church members and the children at the nursery school, the Plaintiff decided to build a toilet block, offices and a hall, together with a boundary wall on Nairobi Block 153/5; and a hall, classrooms, offices and a boundary wall on Nairobi Block 153/7. The Plaintiff then applied for, and obtained the necessary approval from City Council of Nairobi, and embarked on the said developments. The deponent attached the letters of approval and approved plans by the City Council of Nairobi.

The deponent claimed that on 13<sup>th</sup> April 2013, the 1<sup>st</sup> Defendant who is the elected Ward Representative for Quarry Ward, and the 2<sup>nd</sup> Defendant who is the Local Area Assistant Chief, accompanied by several youths visited the suit properties and demanded that the construction should stop forthwith, otherwise they will demolish the boundary wall already constructed. Further, that the 1<sup>st</sup> Defendant claimed that the suit properties are public land and that unless he is given part of the property to sub-divide to the youths, they would proceed to demolish the property and all its developments.

### **The Defendants' Response**

The 1<sup>st</sup> Defendant filed a Replying Affidavit sworn on 20<sup>th</sup> May 2013 in response to the Plaintiff's application, wherein he deponed that he was previously the area Councilor for five years and was a member of the City Council of Nairobi's Planning Committee. Further, that during his tenure as the area Councilor, he was aware that the said suit property had been allocated for the purpose of putting up a nursery school, and that he has an obligation to the public to keep watch on any public utility so that it does not end up being converted into a private property.

The deponent further stated that on the 13<sup>th</sup> of April 2013 he, as the elected representative of the people, went to the suit properties at the request of the public after being informed of commotion thereon, and tried to calm the situation. He denied invading, threatening, or demanding to be given part of the suit properties, or interfering with the said properties in any way whatsoever. He claimed that he acted in the best interest of the people whom he represents.

The 2<sup>nd</sup> Defendant did not file any response to the Plaintiff's Notice of Motion.

### **The Submissions**

By consent of both parties, the application was canvassed by way of written submissions. M.N Oonge & Co, the Advocates for the Plaintiff, filed submissions dated 14<sup>th</sup> June 2013. The Plaintiff submitted that it has demonstrated that it is the registered owner of the suit properties and is therefore entitled to the rights of a proprietor as enshrined in section 25(1) of the Land Registration Act 2012. Further, that the 1<sup>st</sup> Defendant has admitted that he was on the suit properties on the material day after he was informed of commotion thereon.

Otieno Okeyo & Co the Advocates for the 1<sup>st</sup> Defendant filed submissions dated 12<sup>th</sup> August 2013. They argued on behalf of the 1<sup>st</sup> Defendant that the Plaintiff had failed to meet the threshold for the grant of an injunction laid down in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, and had failed to establish a *prima facie* case as they had failed to substantiate the allegations against the 1<sup>st</sup> Defendant. Further, that the Plaintiff had not established any special interest in the suit properties that cannot be quantified or remedied in damages, and that the balance of convenience should tilt in favour of the 1<sup>st</sup> Defendant who has been sued without any evidence of his complicity in the Plaintiff's grievance.

### **The Issues and Determination**

I have read and carefully considered the pleadings, annexed evidence and submissions made. The question to be determined is whether the Plaintiff has met the threshold for the grant of temporary injunction as stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** . The principles as to the grant of a temporary injunction as stated in the said case are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience. The first question I must answer is whether the Plaintiff has established a *prima facie* case.

A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** as follows:

**“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

I find that I must agree with the Plaintiff’s submissions that they have shown a *prima facie* case. The Plaintiff has provided evidence of their title to the suit properties and of the necessary approvals to develop the said properties. The 1<sup>st</sup> Defendant also admits to having been on the suit properties when the alleged threats of invasion, demolition and sub-division were made. He also claims to have been acting in the public interest, but did not bring any evidence of the suit property being public land. In addition, as the Defendants have not indicated their willingness or ability to compensate the Plaintiff in damages, I will make no finding as to damages as an adequate remedy in this application.

I accordingly allow the Plaintiff’s Notice of Motion dated 15<sup>th</sup> April 2013 for the foregoing reasons, and hereby orders as follows:

1. That the Defendants, their servants, agents and/or licencees be and are hereby restrained from invading and/or demolishing the Plaintiff’s perimeter fence and other properties on LR. No. Nairobi Block 153/5 and Nairobi Block 153/7 and/or causing the same to be sub-divided to smaller portions pending the hearing and determination of this suit or until further orders.
2. That the Defendants, their servants, agents and/or licencees be and are hereby restrained from interfering with the Plaintiff’s peaceful enjoyment of the properties known LR. No. Nairobi Block 153/5 and Nairobi Block 153/7 pending the hearing and determination of this suit or until further orders.
3. That the Officer Commanding Station, Embakasi Police Station to assist in the enforcement the orders granted herein.
4. The costs of the Plaintiff’s Notice of Motion dated 15<sup>th</sup> April 2013 shall be in the cause.

**Dated, signed and delivered in open court at Nairobi this \_\_\_24<sup>th</sup>\_\_\_ day of \_\_\_March\_\_\_, 2014.**

**P. NYAMWEYA**

**JUDGE**